

The decedent, Elfido O. Gonzalez, died on December 9, 2003, as the result of injuries he received when he jumped from a bridge overpass to avoid being struck by a vehicle spinning out of control on the icy road surface of the bridge. At the time of his death, the decedent did not have a surviving spouse, children or dependents. Surviving the decedent are his mother and father.

The sole issue presented to the Administrative Law Judge (ALJ) was to determine whether decedent's accidental death arose out of and in the course of his employment. The ALJ found that travel was not an integral part of the decedent's employment and that because the accident occurred after decedent had left work for the day the injuries did not arise out of and in the course of employment. Consequently, benefits were denied.

The decedent's heirs request review of whether the decedent's accidental death arose out of and in the course of employment. The decedent's heirs argue that travel was an integral and necessary part of decedent's employment with respondent because he had traveled from Wichita, Kansas, to Tecumseh, Kansas, to work on a project. Accordingly, the accident arose out of and in the course of his employment and the decedent's surviving parents are entitled to a \$25,000 lump sum payment pursuant to K.S.A. 2004 Supp. 44-510b(d).

Respondent argues that travel was not an inherent part of decedent's employment and that under the facts of this case the decedent had left work for the day when the accident occurred. And because decedent had established a temporary residence while working on the project in Tecumseh, Kansas, the going and coming rule precludes a finding the accident arose out of and in the course of employment. The respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The decedent was employed for respondent as a state licensed asbestos removal worker. The respondent would bid on asbestos removal jobs and, if successful, would assign crews to the various job sites. The asbestos removal jobs could take from between a day to up to several months but would typically last for a couple of weeks. The decedent lived in Wichita, Kansas, and was typically assigned to jobs in the Wichita area so that he could commute daily to the job site.

On occasion the asbestos removal crews would be temporarily assigned to work at a job site that was not within daily commuting distance from Wichita, Kansas. When such work assignments were made the crew members would be provided a daily per diem. But the per diem was only provided for work days and did not include weekends.

In this instance, the decedent was assigned to a work crew for a project at the Tecumseh power plant near Topeka, Kansas. The job was performed on a four 10-hour day workweek and the daily work shift ended at 5:30 p.m. The decedent was not paid mileage to get to the job site but was provided a daily \$40 per diem for the days worked at the Tecumseh power plant. The per diem could be spent in any manner by decedent

but the respondent's intent was that it be used to defray motel, food or gas expenses while he was required to work beyond daily commuting distance from his home in Wichita, Kansas. But if the \$40 per diem was not used the decedent was not required to reimburse any unused portion to respondent.

The decedent traveled from Wichita, Kansas, to the job site in Tecumseh, Kansas, in the truck of a co-worker. During the first four day workweek decedent stayed at a hotel but when he returned the next week he had made arrangements to stay with a friend in order to avoid lodging expenses.

On Tuesday, December 9, 2003, the decedent left work after his shift ended at 5:30 p.m. The decedent was a passenger in a car that the driver lost control of on an icy bridge overpass. The car struck both sides of the bridge and then came to a stop in the middle of the bridge roadway. When the car came to a stop on the bridge roadway, the driver tried to restart the stalled engine and the decedent left the car. As he was standing next to the vehicle two more cars lost control on the ice and started spinning in his direction. In order to avoid being hit by those vehicles he jumped from the bridge and suffered a fatal blunt head trauma as a result of the fall.

Accidents occurring while employees are on their way to work or after leaving work are generally not compensable under the Act.

The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .¹

K.S.A. 44-508(f) "bars an employee injured on the way to or from work from workers compensation coverage."² "The rationale for the 'going and coming' rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment."³

¹ K.S.A. 2004 Supp. 44-508(f).

² *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 655, 907 P.2d 828 (1995).

³ *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

But there are exceptions to the above going and coming rule. The statute itself provides two exceptions – a “premises” exception and a “special hazard” exception. And the Kansas Court of Appeals has also held the going and coming rule does not preclude an injured worker from recovering workers compensation benefits when the travel was an incident of the employment.

Under the ‘incident of employment’ exception to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is either (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of employment.⁴

In *Butera*,⁵ the Kansas Court of Appeals held that driving to and from a regular job site is not considered an integral part of the job for a worker who is temporarily assigned to work at that site. The present claim is analogous. Although the decedent’s Tecumseh work site was temporary in the sense that it would no longer exist after respondent completed its project at the power plant, nonetheless, claimant regularly drove to that site to begin his workday. As in *Butera*, although decedent received per diem he was not specifically reimbursed for his mileage commute, his off-hour activities were not under respondent’s direction or supervision and when the accident occurred he faced no greater risk than other travelers. Accordingly, there is nothing to distinguish decedent’s commute to and from his temporary lodging from a normal commute from his home.

The Board affirms the ALJ’s determination that travel was not an inherent part of decedent’s employment and that at the time of the accident decedent’s workday had concluded. Therefore, under K.S.A. 44-508(f) and the principles set forth in *Butera*, claimant’s accident occurred after concluding work for the day and under the facts of this case would not be compensable under the Act. Consequently, the decedent’s accident did not arise out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 9, 2004, is affirmed.

IT IS SO ORDERED.

⁴ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, Syl. ¶ 3, 955 P.2d 1315 (1997).

⁵ *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

Dated this _____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director